Supreme Court, U.S.
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No. 92-1485

In the Supreme Court of the United States

OCTOBER TERM, 1992

PONY EXPRESS COURIER CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly held that petitioner's "courier-guards" are not "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 981 F.2d 358. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. A38-A43) is reported at 306 N.L.R.B. No. 22. The Board's decision and direction of election in the underlying representation proceeding (Pet. App. A21-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1992. The petition for a writ of certiorari was filed on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a package delivery service in New Brighton, Minnesota. Pet. App. A25. Petitioner employs drivers, whom it classifies as "courier-guards," to transport goods to and from its customers. Courier-guards transport a variety of items for banks and businesses, including food stamps, payroll checks, bank checks in the collection process, and medical supplies, but neither cash nor jewelry. *Id.* at A26. A courier-guard is uniformed, unarmed, and normally unaccompanied when driving his or her route. *Id.* at A26, A28. Courier-guards receive minimal security training: they do not undergo any specific training in protective measures other than being instructed to read petitioner's employee handbook. *Id.* at A29.

Although the employee handbook states that delivery vehicle doors "must be kept locked at all times," in practice, courier-guards rarely lock their vehicles during brief stops, and sometimes leave them unattended with the engine running. Pet. App. A26-A27, A30. Some delivery vehicles do not have locks. *Id.* at A27. Courier-guards do not lock their vehicles while they are working inside them. *Ibid.* Materials picked up from and delivered to various banking customers, including the Federal Reserve Bank in Minneapolis, are transported by the courierguards in unlocked containers. *Id.* at A27, A30.

More than half of all pickups are made by courier-guards after the close of the customer's business day. Pet. App. A27. Some after-hours pickups are made from unsecured areas of the customer's premises. *Id.* at A30. International Business Machines Corp.

(IBM), one of petitioner's largest customers, requires the use of an access code for entry to some of its facilities; generally, IBM leaves its packages in a foyer for pickup. *Id.* at A28. At one IBM facility, packages are left in a hallway accessible from the outside through an unlocked door. *Ibid.* At another of its facilities, IBM changed the access code without notifying petitioner, and simply left its packages for pickup on a stoop. *Ibid.* Courier-guards use keys or key-cards to make pickups and deliveries at about 32 of petitioner's more than 300 banking customers, but it is unclear how many of these transactions occur after business hours and (except in three instances) what area of the customer's premises the key or key-card unlocks. *Id.* at A27-A28.

Petitioner's employee handbook places responsibility on its courier-guards "for the security of not only the items being picked up and delivered, but also the customer's building" when they are on the customer's premises "during nonworking hours." Pet. App. A28. Courier-guards are instructed, however, not to enter a customer's building if they discover it is unlocked when it should be locked; rather, they notify their dispatcher or the police. *Id.* at A29. The employee handbook also states that courier-guards are not to use force to protect customer property; they are allowed to use physical force only if "absolutely necessary to protect your life or the life of another." *Ibid.*

2. On May 1, 1991, Teamsters Local 120, International Brotherhood of Teamsters, AFL-CIO (Union), filed a petition with the Board for a representation election in a unit consisting of drivers and dispatch-

ers employed by petitioner at its New Brighton operation. Pet. App. A7. Petitioner contended that no question concerning representation existed, since its courier-guards are "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act (Act), 29 U.S.C. 159(b)(3), and thus cannot be represented by a labor organization which, like the Union, admits non-guard employees to membership. Pet. App. A25.[1]

On June 7, 1991, the Board's Regional Director, following a hearing, ruled that petitioner's courier-guards are not "guards" within the meaning of Section 9(b)(3). Pet. App. A29. The Regional Director observed that, under the Board's decision in *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990) (*Purolator IV*),[2] in order for a "courier-guard" to be a

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[1] Section 9(b)(3) provides:

> The Board shall decide in each case whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a unit of guards if such organization admits to membership * * * employees other than guards.

[2] The Board had considered the Section 9(b)(3) status of Purolator Courier Corp.'s courier-guards in three prior cases. See *Purolator Courier Corp.*, 266 N.L.R.B. 384 (1983) (*Purolator III*), enforced *sub nom. Local 851, International Bhd. of Teamsters* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984) (per

statutory guard, that employee's basic job function must involve, directly and substantially, the protection of valuable property of the employer's customers. Pet. App. A29. Applying that test, the Regional Director held: "[T]he primary duties of [petitioner's] courier-guards are the pickup, transport and delivery of customers' materials. The security measures actually carried out by courier-guards appear to be ordinary, common-sense measures, and are not characteristic of true guard status." *Id.* at A31.

In so holding, the Regional Director found "no evidence that would tend to show that once a courier-guard has gained access to a customer's building, either during or after the customer's business hours, the courier-guard has any job function other than to pick up and deliver materials." Pet. App. A28-A29. The Regional Director noted that petitioner's courier-guards receive minimal security training, use unsecured containers for transporting customer property, and leave their delivery vehicles unlocked and unattended with the engine running. *Id.* at A29-A30. The Regional Director also determined that the company rule restricting the use of physical force by courier-guards was an indication that "their security functions are subordinate to the transportation of customers' property." *Id.* at A30-A31.

Further, the Regional Director found that petitioner's rule prohibiting courier-guards from entering unlocked buildings, at times when the buildings should be locked, negated responsibility for protect-

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curiam); *Purolator Courier Corp.*, 265 N.L.R.B. 659 (1982) (*Purolator II*); *Purolator Courier Corp.*, 254 N.L.R.B. 599 (1981) (*Purolator I*).

ing customer property, since the courier-guard "thereby avoids confrontation with unauthorized persons and avoids taking custody of a customer's materials." Pet. App. A30. To alert the police in that eventuality, the Regional Director concluded, is no more indicative of responsibility for protecting customer property than "a like report by any good citizen." *Ibid.*[3]

Accordingly, the Regional Director directed an election in a unit consisting of all courier-guards and dispatchers employed by petitioner at its New Brighton operation. Pet. App. A22. The Board denied petitioner's request for review of the Regional Director's decision, finding that it raised no substantial issue warranting review. *Id.* at A7. In July 1991, the Union won the election and was certified as the collective bargaining representative of the employees in the unit. *Ibid.*

Petitioner thereafter refused to bargain. In October 1991, the Union filed an unfair labor practice charge against petitioner, and the Board's General Counsel issued a complaint. Pet. App. A7-A8, A38. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted

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[3] Petitioner also has a rule prohibiting courier-guards from permitting strangers to enter a customer's building with them after hours. Pet. App. A29. The Regional Director found that rule "incidental to the courier-guards' pickup and delivery function." *Id.* at A30. "[S]ince a courier-guard has no discretion to determine who should or should not enter the premises," the Regional Director concluded, he or she "is not employed for the purpose of controlling access to customers' premises." *Ibid.*

summary judgment decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain upon request with the Union. Pet. App. A38-A43.[4]

3. The court of appeals enforced the Board's order. Pet. App. A18. Citing this Court's decision in *Allied Chemical & Alkali Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), as well as its own precedents, the court of appeals observed that "[t]he Board has broad discretion in certifying an appropriate bargaining unit because of its expertise in this area." Pet. App. A9. The court then held that substantial evidence supported the Board's conclusion that petitioner's courier-guards are not "guards" within the meaning of Section 9(b)(3), as construed by the Board in *Purolator IV*.[5] Pet. App. A10-A13.

The court of appeals found that the precautions petitioner's courier-guards follow when making after-hours pickups and deliveries at a customer's premises are "common-sense measures which could be characteristic of any driver employed by a pickup and delivery service." Pet. App. A12. Agreeing with the Board, the court concluded that those precautions "do

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[4] In the representation proceeding, petitioner sought the exclusion of its dispatchers from the bargaining unit on the ground that they are supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). The Regional Director found that the dispatchers are not statutory supervisors. Pet. App. A31-A36. The court of appeals affirmed that ruling as supported by substantial evidence, *id.* at A18, and petitioner does not seek further review of the issue.

[5] The court refers to this decision as "*Purolator II*". In fact, it is *Purolator IV* (see note 2, *supra*).

not require the level of protection to customer property that would afford [the courier-guards] true guard status under the Act." *Id.* at A11-A12. The court noted that the security training received by the courier-guards is limited to instructions contained in the employee handbook "and what little direction is given by the Branch Manager in employee interviews." *Id.* at A12. The court also observed that, "either by choice or impossibility," some of the courier-guards do not lock their vehicles when making deliveries. *Ibid.* Accordingly, on the facts presented, the court found that petitioner's courier-guards are not engaged directly and substantially in the protection of customer property. *Id.* at A13.[6]

The court of appeals also considered petitioner's contention that the Board's *Purolator IV* standard is a departure from prior Board precedent and is inconsistent with the purpose and policy of Section 9(b)(3). Pet. App. A13-A14. The court observed that the Board is empowered to modify its construction of the Act "if such change is consistent with the legislative purpose and is reasonable." *Id.* at A13. The court assumed *arguendo* that *Purolator IV* represented a departure from "past practice," but held

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[6] In addition, the court of appeals found that petitioner had circulated a memorandum to its branch managers, which instructed them to insist that employees refer to its drivers as "courier-guards" for the purpose of preserving their guard status under the Act. Pet. App. A13. The court stated that "[m]erely bestowing a particular label upon the drivers neither expands their function nor magically transforms them into statutory guards under the Act, because we look to duties, not job titles." *Ibid.*

that standard to be a reasonable construction of Section 9(b)(3). Pet. App. A14.

ARGUMENT

1. Petitioner contends (Pet. 14-16) that, prior to *Purolator IV*, the Board had established a general policy that the driver-employees of a courier service are "guards" within the meaning of Section 9(b)(3). Petitioner asserts (Pet. 25-29) that *Purolator IV* represents a departure from that policy and is contrary to the history and purpose of Section 9(b)(3). That claim is jurisdictionally barred, and, in any event, does not warrant this Court's review.

a. In the court of appeals, petitioner argued that the Board's *Purolator IV* test departs from prior precedent and conflicts with the purpose of Section 9(b)(3). That claim was not raised before the Board, however. Rather than challenge the *Purolator IV* test, petitioner argued before the Board that *Purolator IV* was factually distinguishable from this case, because the duties of its courier-guards differed from those of the courier-guards at issue in *Purolator IV*.[7]

Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." Because petitioner has shown no "extraordinary circumstances" justifying its failure to raise its legal challenge to the

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[7] See Pet. Request for Review at 12-14; Pet. Response to General Counsel's Motion for Summary Judgment at 3-4. Petitioner also sought to analogize the functions of its courier-guards to employees found in other cases to be statutory guards.

Purolator IV test before the Board, petitioner is jurisdictionally barred from asserting it before this Court. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975).

b. Even if petitioner's challenge to *Purolator IV* were properly presented, that claim fails. The test does not represent a basic change in Board policy with respect to the status of courier-guards under Section 9(b)(3), but simply refines that policy. Moreover, whether or not *Purolator IV* reflects a change in policy, the court of appeals correctly concluded that it is a reasonable interpretation of Section 9(b)(3).

(i) Congress enacted Section 9(b)(3) because it was concerned with the possibility that, if guards were included in production units, their loyalty to fellow union members might conflict with their duty to report to their employer derelictions of duty or violations of rules by those employees. *Walterboro Manufacturing Corp.*, 106 N.L.R.B. 1383, 1384-1385 (1953). The Board has recognized that the duties of courier-guards may implicate that concern, because "[i]f a substantial function of the courier-guards is to protect customers' property, that function would of necessity include the protection of that property against all others and thus meet the 9(b)(3) requirement of enforcing against employees and other persons rules for the protection of such property." *Purolator IV*, 300 N.L.R.B. at 814 n.7.

In determining whether a "courier" is a statutory guard, the Board has long recognized the distinction

between the *protection* of property and the *delivery* of property. Thus, in *Interstate Co.*, 125 N.L.R.B. 101 (1959), the Board held that a courier, whose duties included picking up money from various restaurants operated by his employer and delivering it to a central facility for deposit in a bank, was not a statutory guard because he was employed "not to guard the money of the [e]mployer but rather to transport it from place to place." *Id.* at 106. The Board made the same distinction in cases involving the transportation of property belonging to a third party rather than to the courier-guards' employer. See *Brink's Inc.*, 226 N.L.R.B. 1182, 1183 (1976) (relevant inquiry is "whether the couriers here protect property of the [e]mployer's customers").

In several later decisions, the Board's finding of statutory guard status gave significant weight to the fact that the couriers were responsible, as in *Brink's Inc.*, for making pickups and deliveries on customers' premises after business hours.[8] Nevertheless, in *Purolator III* the Board reiterated that the ultimate issue is whether "the basic function of these courier-guards involves, directly and substantially, the protection of valuable property of the [e]mployer's

[8] See *Purolator I*, 254 N.L.R.B. at 599-600 (substantial number of pickups and deliveries made during non-business hours; couriers issued keys required for entering premises, opening security vaults, and disengaging alarm systems); *Purolator II*, 265 N.L.R.B. at 660-661 (ninety percent of drivers required to use keys to open customer security vaults; ninety-five percent of drivers use keys to enter customer premises during non-business hours). See also *MDS Courier Service, Inc.*, 248 N.L.R.B. 1320, 1320-1321 (1980).

customers," 266 N.L.R.B. at 385 (citing *Purolator I* and *Purolator II*).

In *Purolator IV*, the Board reexamined the standards used to determine the status of courier-guards under the Act, in light of the substantial growth and change that had occurred in the guard and courier industries since the enactment of Section 9(b)(3) in 1947. 300 N.L.R.B. at 815 n.11. After such reexamination, the Board reaffirmed its longstanding view that the determinative issue with respect to the status of courier-service employees under Section 9(b)(3) is "whether [their] basic duties * * * focus on the *protection* of customer property" or, instead, whether they "essentially function not as guards but as delivery drivers for the [e]mployer's customers." 300 N.L.R.B. at 814 (emphasis in original). The Board acknowledged that, in some previous decisions, it had "placed great weight on whether the courier-guards had access to customer premises rather than analyzing the entire range of actual employee duties." *Id.* at 815 n.9. It concluded that it is more appropriate to treat "access to customer property as one factor among others in determining guard status," rather than as a "bright-line" test of guard status. *Id.* at 815 n.11.

In sum, contrary to petitioner's contention (Pet. 28-29), the ultimate test that the Board applied in *Purolator IV*—*i.e.*, whether the basic function of the courier-guards involves the protection of valuable property of the employer's customers—is the same test that was applied in *Purolator III*, and is drawn from principles enunciated in other earlier courier-guard cases. *Purolator IV* modified the Board's

approach only to the extent of abandoning the practice reflected in some of the prior cases of giving controlling weight to the factor of access to customer property.

(ii) Even if the *Purolator IV* test were deemed a revision of Board policy, the Board has the authority to modify its construction of the Act. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). The issue for the courts is whether the Board's approach is rational and consistent with the Act. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). The court of appeals correctly concluded that, even assuming that a departure from past practice exists, "the Board's construction of the Act as set forth in *Purolator* [*IV*], mandating a case-by-case approach utilizing a variety of factors in determining the status of a guard under the Act, is certainly reasonable, if not preferred." Pet. App. A14.

Petitioner asserts (Pet. 22-23, 28-29) that, by requiring "direct and substantial" involvement in the protection of customer property, the Board's *Purolator IV* standard embraces an unduly narrow "quantitative" test of guard status that is inconsistent with the Act. The "direct and substantial" involvement aspect of the *Purolator IV* test, however, is not a requirement that courier-guards must spend any particular percentage of their work time performing guard duties.[9] Rather, the *Purolator IV* test is

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[9] The Board has rejected such a rule. See *Walterboro Manufacturing Corp.*, 106 N.L.R.B. 1383, 1384-1385 (1953) (watchmen, who were responsible for making plant rounds, punching time clocks at regular intervals, and reporting infractions of company rules, were statutory guards even though they spent

designed to address the question whether a given unit of courier-guards in fact has been vested by the employer with statutory guard duties. If a courier-guard's range of duties includes true property-protection duties, that employee is a statutory guard, whether he or she actually spends a substantial percentage of time performing those (as compared to other non-guard) duties.[10]

Nor is petitioner correct in arguing (Pet. 23-24, 29) that the requirement of "direct and substantial" involvement in protection of property would exclude from statutory guard status employees such as armed guards employed by an armored delivery service who are also responsible for driving their vehicles. As the Board pointed out in *Purolator IV*, armored vehicle drivers are statutory guards because they "are obviously employed to protect property within the meaning of [Section 9(b)(3)]." 300 N.L.R.B at 814 (quoting *Armored Motor Service Co.*, 106 N.L.R.B. 1139, 1140 (1953)). Thus, such an employee is a statutory guard because his or her basic duties "focus

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75 percent of their time at maintenance work, and only 25 percent of their time performing guard duties).

[10] Petitioner incorrectly suggests (Pet. 26-27) that, in decisions prior to *Purolator IV*, the Board and the courts have found various kinds of employees to be Section 9(b)(3) guards without regard to the extent to which their job duties involve the protection of property. In each of the cases cited by petitioner, the employees were held to be statutory guards because their basic duties included significant responsibility for protecting the employer's (or its customers') property or premises.

on the protection of customer property." *Purolator IV*, 300 N.L.R.B. at 814 (emphasis omitted).[11]

2. Petitioner contends (Pet. 17) that the court of appeals' decision conflicts with *Local 851, International Bhd. of Teamsters* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984) (per curiam). That contention is without merit; the job duties of the courier-guards found to be statutory guards in *Local 851* differ significantly from those of petitioner's employees.

In *Local 851*, the Board found that the courier-guards before it were statutory guards because "[their] basic function * * * involves, directly and substantially, the protection of valuable property of the [e]mployer's customers." *Purolator III*, 266 N.L.R.B at 385. The courier-guards were entrusted with a wide variety of valuable commodities; were bonded and subjected to security clearance; were given keys to obtain access to the premises and security vaults of a substantial number of customers; and were held accountable for the safekeeping of packages in their vehicles and for taking precautions when entering or leaving customers' locked premises. *Id.* at 384-385. The Second Circuit affirmed the Board's finding as supported by substantial evidence. 732 F.2d at 44.

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[11] Petitioner briefly contends (Pet. 29-30) that, assuming that *Purolator IV* states the proper inquiry under Section 9(b)(3), the Board and the court of appeals misapplied that test in holding that its courier-guards are not "guards" within the meaning of that Section. Petitioner's fact-bound disagreement with the court of appeals' application of the substantial evidence test does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Here, petitioner's courier-guards, like those in *Local 851*, are entrusted with a variety of valuable goods, Pet. App. A26, but the similarity in their respective duties ends there. Although petitioner has a policy of conducting criminal background investigations of new employees, the court of appeals found that "there is some question whether this has been done in practice" at New Brighton. *Id.* at A4. Moreover, the record in this case demonstrates that petitioner's courier-guards are not given keys to access a substantial number of customers' premises. As the Regional Director noted, petitioner's own evidence indicated that keys or key-cards were required for access to only about ten percent of petitioner's commercial banking customers. *Id.* at A27.

Further, the record does not demonstrate that petitioner's courier-guards have access to customers' security vaults. Neither the Board nor the court made such a finding, and petitioner's own evidence showed that a "box key" was used at only two of its more than 300 commercial banking customers. Pet. App. A27-A28. Nor does petitioner hold its courier-guards responsible for safekeeping of packages in their vehicles. As the Regional Director found, petitioner's courier-guards generally disregard the company rule requiring them to keep their delivery vehicles locked at all times, *id.* at A27, and there was no finding below that petitioner actually enforces that rule or punishes violators.[12] Finally, the court of

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[12] As the court of appeals noted, the storage compartment of many employee-owned delivery vehicles cannot be locked, and

appeals found that the cautionary procedures followed by the courier-guards when making pickups and deliveries after business hours are measures "characteristic of any driver employed by a pickup and delivery service." *Id.* at A12. Accordingly, there is no reason to doubt that the Second Circuit would decide this case as did the court below and uphold the Board's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

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some company-owned delivery vehicles are not equipped with locks. Pet. App. A3.